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Public Investment Bank Bhd v Yap Chee Hean

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2134–09 OF 2013
ZAHARAH IBRAHIM, ANATHAM KASINATHER AND DAVID WONG JJCA
2 MAY 2014

Contract — Estoppel — Applicability — Whether estoppel may operating against party to contract

Equity — Estoppel — Estoppel by representation — Whether mere silence or inaction can amount to representation

Securities — Remisier — Liability of stockbroking company — Whether stock broking company liable for client's losses — Whether remisier agent of stock broking company — Fraud committed by remisier against client due to foolhardiness of client — Remisier conducting unauthorised trades — Shares and funds in client's account missing — Client failing to notify stock broking company of discrepancies in trading account — Whether client estopped from claiming losses against stock broking company

The appellant was a company undertaking stock broking business. The respondent with the view to participating in share purchase transactions through the appellant executed an account opening form and a Share Trading Contract ('STC') with the appellant. Initially the respondent's account was serviced by a remisier named Tan Teik Weng ('TTW'). However, subsequently TTW ceased to be the respondent's dealer representative and one Teh Bee Yean ('TBY') took over as the remisier serving the respondent's account. The contract between TBY and the appellant was the Standard Remisier's Contract ('SRC'). According to the respondent, he could not read English. The respondent claimed that TBY had procured the change of the respondent's correspondence address from his residential address to TBY's residential address. The change of the respondent's address and account particulars were mailed to the respondent at his old address, as well as to his new address, without any objections being received from him. Between 2009 to 2012, TBY carried out all share sale and purchase transactions in the respondent's trading account. According to the respondent, during this time, he invested a total of RM3,393,994.09 in share trading, out of which RM1,937.207.90 was banked in to the appellant's general collection account and RM1,456,786.19 was paid directly to TBY for the purposes of share trading. However, towards the end of

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2012, when the respondent conducted an examination of his investment account, he found that there were neither shares nor proceeds of sale of shares in his account. TBY had manipulated the respondent's account. The respondent's shares and funds in the respondent's account were missing. The trial judge found that TBY acted as the agent of the appellant when conducting the unauthorised trades using the respondent's account and hence the appellant was held responsible to account for the losses suffered by the respondent in his trading account. The appellant appealed against that decision.

Held, allowing the appeal with no order as to costs:

(1) By cl 5.1.20 of the SRC, TBY agreed not to hold herself out as an agent of the appellant when effecting trades under the respondent's account. The respondent could be said to have agreed to treat TBY as his agent when TBY was undertaking trades in his account. Accordingly, these clauses altered the relationship between the appellant and the respondent which would otherwise be one of principal-agent (see para 16).

(2) Even if the court was wrong in finding that the appellant was not liable for the losses suffered by the respondent in his account by reason of the terms and conditions of the two contracts, the doctrine of estoppel was nevertheless applicable on the facts of this case (see para 17).

(3) Estoppel is capable of operating against a party to a contract in cases where the circumstances justify imputing knowledge of the fraud of the remisier upon the client. Ignorance is no excuse for the client not reporting the fraudulent conduct of the remisier. Whilst mere silence or inaction cannot amount to a representation so as to give rise to the operation of the doctrine of estoppel, the position would be otherwise if there was a duty to inform the other party to the contract. The respondent was clearly under a duty to notify the appellant of any discrepancies in his trading account. This duty was imposed by para 11 of the STC (see paras 20–24).

(4) Although the fraud perpetrated by the remisier included having the respondent transfer the address for service of the contract notes etc to the address of the remisier, this could hardly afford a justification for the transfer of liability for the loss in the respondent's account to the appellant since it was the foolhardiness of the respondent himself which resulted in the respondent being ignorant of the manipulation of his trading account by the remisier (see para 26).

(5) The respondent executed the STC and by the terms of the STC, he assumed a duty to monitor his trading account closely, which he failed to do. His failure, amounted in law to a representation by conduct to the appellant that there were no discrepancies in his trading account thereby

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causing the appellant to retain the services of TBY as its remisier. Hence, the respondent was estopped in law from seeking to recover his losses in his trading account (see para 26).

[Bahasa Malaysia summary

Perayu merupakan sebuah syarikat yang mengakujanji perniagaan pembrokeran saham. Responden, untuk mengambil bahagian dalam transaksi pembelian saham melalui perayu, telah memeterai borang pembukaan akaun dan kontrak perdagangan saham ('STC') dengan perayu. Pada mulanya, akaun responden diuruskan oleh *remisier* bernama Tan Teik Weng ('TTW'). Walau bagaimanapun, TTW berhenti menjadi wakil urus niaga responden dan seorang yang bernama Teh Bee Yean ('TBY') mengambil alih sebagai *remisier* yang akaun responden. Kontrak antara TBY dan perayu adalah kontrak *remisier* standard ('SRC'). Menurut responden, dia tidak boleh membaca Bahasa Inggeris. Responden mendakwa bahawa TBY telah berjaya menukar alamat surat-menyurat responden daripada alamat rumahnya kepada alamat rumah TBY. Pertukaran alamat responden dan butiran akaun dialamatkan kepada responden di alamat lamanya, dan juga alamat barunya, tanpa apa-apa bantahan diterima olehnya. Antara 2009 dan 2012, TBY menjalankan transaksi jual beli saham dalam akaun perdagangan responden. Menurut responden, ketika ini, dia melaburkan sejumlah RM3,393,994.09 dalam perdagangan saham, yang mana RM1,937.207.90 dibankkan ke dalam akaun kumpulan am perayu dan RM1,456,786.19 dibayar secara langsung kepada TBY bagi tujuan perdagangan saham. Walau bagaimanapun, di penghujung 2012, apabila responden menjalankan pemeriksaan ke atas akaun pelaburannya, dia mendapati tiada saham mahupun hasil jualan saham dalam akaunnya. TBY telah memanipulasikan akaun responden. Saham-saham responden dan dana dalam akaun responden telah hilang. Hakim bicara mendapati bahawa TBY bertindak sebagai ejen perayu apabila melaksanakan saham-saham tanpa kebenaran, menggunakan akaun responden dan oleh itu, perayu bertanggungan ke atas akaun bagi kehilangan yang dialami oleh responden dalam akaun dagangannya. Perayu merayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Di bawah klausa 5.1.20 SRC, TBY bersetuju untuk tidak menjadi ejen kepada perayu apabila melaksanakan dagangan-dagangan di bawah akaun responden. Responden boleh dikatakan telah bersetuju untuk menganggap TBY sebagai ejennya apabila TBY mengakujanji dagangan-dagangan tersebut dalam akaunnya. Dengan itu, klausa-klausa ini menukar hubungan antara perayu dengan responden yang mungkin boleh menjadi satu yang bersifat prinsipal-ejen (lihat perenggan 16).

(2) Jika pun mahkamah khilaf dalam pandangan bahawa perayu bertanggungan bagi kerugian yang dialami oleh responden dalam

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akaunnya dengan sebab terma dan syarat kedua-dua kontrak, doktrin estopel walau bagaimanapun terpakai ke atas fakta-fakta dalam kes ini (lihat perenggan 17).

(3) Estopel boleh beroperasi terhadap pihak dalam kontrak dalam kes-kes di mana hal keadaan memberi justifikasi untuk mengaitkan pengetahuan penipuan *remisier* ke atas pelanggan. Kejahilan bukanlah alasan untuk pelanggan tidak melaporkan perlakuan tipu ke atas *remisier*. Walaupun, berdiam sahaja atau tidak mengambil tindakan tidak boleh terjumlah kepada satu perwakilan yang membangkitkan operasi doktrin estopel, keadaan akan berbeza sekiranya terdapat kewajipan memaklumkan pihak satu lagi dalam kontrak. Responden jelas berkewajipan untuk memaklumkan perayu mengenai kepincangan dalam akaun dagangannya. Kewajipan ini selaras dengan perenggan 11 STC (lihat perenggan 20–24).

(4) Walaupun penipuan oleh *remisier* melibatkan responden menukar alamat bagi perkhidmatan nota-nota kontrak dan lain-lain kepada alamat *remisier*, ini tidak memberi jusitifikasi bagi perpindahan liabiliti bagi kerugian dalam akaun responden kepada perayu kerana kerugian responden sendiri yang menyebabkan responden jahil terhadap manipulasi terhadap akaun dagangannya oleh *remisier* (lihat perenggan 26).

(5) Responden memeterai STC dan di bawah terma STC, dia berkewajipan mengawasi akaun dagangannya dengan teliti, yang mana gagal dilakukannya. Kegagalannya itu, terjumlah di bawah undang-undang kepada perwakilan melalui tindakan kepada perayu bahawa tiada percanggahan dalam akaun dagangannya lantas menyebabkan perayu mengekalkan perkhidmatan TBY sebagai *remisier*. Oleh itu, responden diestop di bawah undang-undang untuk menuntut kerugiannya di bawah akaun dagangannya (lihat perenggan 26).]

Notes

For cases on estoppel by representation, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2918–2921.

For cases on remisier in general, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 931–942.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (folld)

RHB Cathay Securities Pte Ltd v Ibrahim Khan and other actions [1999] 3 SLR 464, HC (refd)

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors [1986] AC 80, PC (refd)

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A *Teh Seng Chay v Kuala Lumpur City Securities Sdn Bhd* [2012] 1 LNS 640, CA (refd)

Appeal from: Suit No 22 NCC-263–03 of 2013 (High Court, Kuala Lumpur)

B *Chan Kok Keong (Samuel Tan with him) (Shook Lin & Bok) for the appellant. Amy Ling Huoy Yi (Lim Chong Phang & Amy) for the respondent.*

Anatham Kasinather JCA (delivering judgment of the court):

C BACKGROUND FACTS

[1] The appellant is a company undertaking stock broking business. The respondent with the view to participating in share purchase transactions through the appellant executed an account opening form with the appellant on
D 3 March 2004. Upon the acceptance of the application by the appellant, an account bearing code No ZYA0606 was opened in the name of the respondent. At the time of the opening of the account, the account was serviced by a remisier named Tan Teik Weng.

E **[2]** The contract evidencing the relationship between the appellant and the respondent dated 3 March 2004 ('share trading contract') provided, inter alia, that the respondent:

(a) authorised the appellant's dealer representative to trade in securities of
F recognised and or approved stock exchanges and that the respondent undertook to abide by the rules and regulations of the KLSE;

(b) agreed that the appellant was entitled at its sole discretion to impose such conditions and/or restrictions as it deemed fit and that these terms
G and conditions and any other terms relating to the respondent's account with the appellant may be varied or amended at any time and from time to time by the appellant at its absolute discretion without prior notice to the respondent provided that such amendments, modifications and/or variations shall come into effect upon the receipt of notification by the
H respondent;

(c) agreed that all contract notes, contra statements and monthly statements or other documents of like nature generated and/or issued by the appellant shall be deemed to be final, conclusive and binding on the
I respondent if the appellant did not receive any objection in writing from the respondent within five trading days from the date of the aforesaid documents, but without prejudice to the appellant being at liberty to notify the respondent of errors (if any) on any of the aforesaid documents at any time;

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(d) hereby declared that all oral or written instructions given by the respondent are deemed to be confirmed as soon as they are acted upon by the appellant's dealer representative and any executed instructions shall not be revoked or withdrawn by the respondent;

(e) authorised the appellant's representative named herein to collect cheques on the respondent's behalf;

(f) agreed unconditionally that in the event the dealer's representative is called upon to honour his obligation under an indemnity given by him to the appellant, the respondent shall pay all sums to which the appellant's dealer representative has become liable to pay the appellant in respect of the respondent's account and, which sums have been debited by the appellant to the account of the dealer's representative;

(g) agreed at all times to fully and effectively indemnify the appellant against and keep the appellant fully and effectively indemnified against all actions, sums proceedings, claims, demands, losses, charges, penalties, fees, fines, costs, debts, interests before and after judgment, legal fees (on a full indemnity basis) and expenses whatsoever made, taken, brought, instituted , imposed, suffered, incurred, prosecuted, payable in any way whatsoever (including without limitation negligence, on the part of the appellant, its servants agents, employees) against or by the appellant to any person arising out of or relating or incidental to all matters relating to the respondent's account with the appellant including without limitation breach of any of the agreements, undertakings and covenants herein;

(h) hereby agrees that the appellant's rights of indemnity conferred herein shall continue in full force and effect and shall continue to subsist hereafter notwithstanding the suspension, termination or closure of the respondent's account with the appellant; and

(i) agree to forthwith notify the appellant in writing of any change of any address or any other particulars on the respondent's part, failing which any notice demand or other documents sent by the appellant to the respondent's last known address shall be deemed effected upon delivery or if sent by post two days after the date of posting.

[3] In or around January 2006, Tan Teik Weng ceased to be the respondent's dealer representative. After this date the respondent's trade with the appellant was conducted by or through Ms Teh Bee Yean ('TBY'), who replaced Tan Teik Weng as the remisier of the respondent. The terms and conditions of her contract with the appellant known as the 'standard remisier's contract' was dated 29 June 1999 ('SRC').

[4] The terms of the SRC between the appellant and TBY, inter alia, were:

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(a) TBY was to be allocated and assigned accounts of clients of the appellant and TBY was to service these clients as well as, her own clients as their remisier;

(b) TBY was to deal in securities in the manner stipulated by the appellant in the name of the appellant and subject to dealing guidelines stipulated by the appellant;

(c) TBY was to accept and execute orders placed by and/or received from clients for the purchase and/or sale of securities, upon the terms and the conditions set out in the contract between the appellant and TBY;

(d) TBY undertook at all times to strictly observe, abide and be conversant with all laws, rules, regulations, codes and practices that are relevant to her role and conduct as a remisier, in particular any such Securities Laws, Exchange's Rules, rules of MCD and rules of the clearing house;

(e) TBY guaranteed to the appellant that she was of good character and would at all times act faithfully for and on behalf of the appellant in all her dealings, actions, deeds, responsibilities and undertakings;

(f) TBY was to observe the highest standards of integrity, professionalism and fair dealings and to act honestly in the clients' best interest and act faithfully on behalf of the appellant in the performance and discharge of her duties in particular, offer accurate information and not make any misleading recommendations to clients;

(g) TBY was to refrain from doing anything which may directly or indirectly result in the appellant, its directors, employees, other remisiers or her clients contravening or committing a breach of any of the those laws, rulings, directives and procedures affecting the business of the appellant;

(h) TBY was not to commit any fraud, dishonesty, deceit, misdeed or practice any deception involving or in connection with the her dealings with client(s);

(i) TBY was not to trade under the name of the appellant as principal;

(j) TBY was not to indulge or make use of any manipulative and deceptive device in connection with the purchase and / or sale of securities and /or manipulate the clients' accounts including but not limited to:

(i) using clients' monies in settlement for another client's transaction in securities; and

(ii) buying and selling securities under any of the client(s) accounts with a view of obtaining profit for herself whether as principal or otherwise or for any other client(s) or persons;

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(k) TBY further agreed to indemnify and keep indemnified the appellant against all actions, claims, costs, expenses, losses and liabilities including any litigation (including legal costs on a solicitor and client basis) whatsoever that maybe suffered or incurred by the appellant arising from or in connection with transaction in securities dealt by or through TBY in the name of the appellant save for losses arising from any willful default, errors, negligence, instructions and any incorrect administrative procedures and accounting statements issued by the directors, officers and employees of the appellant; and

(l) TBY without prejudice to the generality of clause (k) herein above agreed to indemnify and keep the appellant indemnified against all actions, claims, costs, expenses, losses and liabilities whatsoever which maybe suffered, sustained or incurred by the appellant arising from or in connection with non-observance and/or non-payment of any transactions in securities entered into between the client(s) and the appellant including but not limited to where the client fails to make delivery and transfers and/or fails to make payment for the purchase of securities, at the fixed delivery and settlement time specified under the exchange's rules and the rules of MCD, and losses are incurred by the appellant as a result of the subsequent 'buying-in' and/or 'selling-out' in accordance with the Exchange's Rules relating to the same.

[5] According to the respondent, some time in or around 2008 or 2009, TBY called the respondent on the telephone and introduced herself as the replacement dealer's representative in view of Tan Teik Weng's resignation. The appellant's case is that TBY became the remisier of the respondent pursuant to a private arrangement between them. In any event, the appointment of TBY as the respondent's remisier resulted in dramatic changes in the account of the respondent maintained with the appellant.

[6] The change commenced with the change of the address of the respondent in the records maintained by the appellant. According to the respondent, following his notification to TBY that he could not read English, TBY offered to assist him by completing and keeping a record of all the documents originating from the appellant and the Bursa Central Depository and keep him advised of their contents. To this end, TBY procured the respondent's consent to the change of his correspondence address from his existing residential address to TBY's residential address at Block 3-2-B Desa Dua Apartment, Lorong D1/5 Desa Aman Puri, Kepong, 52100 Kuala Lumpur. The respondent duly signed the relevant forms with both the appellant and the Bursa Central Depository to effect the aforesaid change. The change of the respondent's address and account particulars were mailed to the respondent at his old address, as well as to his new address, without any objections being received from him.

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[7] Between 2009–2012, TBY carried out all share sale and purchase transactions in the respondent's trading account. According to the respondent, during this time, he invested a total of RM3,393,994.09 in share trading. According to him, this amount was transferred in the following manner:

(a) a sum of RM1,937,207.90 was banked in to the appellant's general collection account; and

(b) a sum of RM1,456,786.19 was paid directly to TBY for the purposes of share trading

With respect to item (ii), the respondent testified that he paid, over a period of three years the sum of RM1,456,786.19 directly to TBY in cash. The reason he gave for handing over such large sums of money in cash to her was that TBY had informed him that she had made payments for share trades on his behalf and required repayment. He was persuaded to do so because he did not have enough time to deposit monies for the purposes of such purchases. The respondent testified that throughout this period from 2009–2012, he did not make any withdrawals from the share account.

[8] Towards the end of 2012, the respondent believing that there might well be a decline in the performance of the stock exchange decided to sell a portion of his shares and retain the share proceeds in cash by way of savings. He then proceeded to conduct an examination of his investment account with the appellant whereupon he found that there were neither shares nor proceeds of sale of shares in his account. On 24 September 2012, the respondent, his brother in law, one Daniel Wong and the respondent's wife, Ms Wong Ooi Wei attended at the appellant's offices and lodged a complaint to the effect that TBY had manipulated the respondent's account and that the respondent's shares in the Bursa Malaysia Depository and funds in the respondent's account were missing.

[9] The appellant undertook its own investigation of the missing funds and shares in the respondent's account and its investigations revealed the following matters:

(a) there was evidence of the respondent having directly banked monies into TBY's personal account;

(b) TBY appeared to have been allowed by the respondent to operate his account freely;

(c) the appellant could not identify whether the monies deposited with TBY were in fact subsequently transferred into the appellant's general account because the appellant had simply no access to TBY's account;

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(d) as for monies deposited directly with the appellant, these monies were deposited into a general collection account No 3077609901. This account is meant for customers of the appellant to deposit monies for the settlement of their trades. The appellant was unable to identify which particular client deposited the monies, unless TBY as the respondent's dealer's representative, directed or instructed the appellant to appropriate these monies to the respondent's account;

(e) the misuse of the respondent's share trading account appeared to have occurred following the change of the respondent's correspondence address to TBY's personal address, a matter to which the respondent freely consented; and

(f) The appellant maintained that it had no knowledge or information of TBY's unauthorised actions and had neither authorised nor approved nor condoned the same.

JUDGMENT OF THE HIGH COURT

[10] The learned trial judge expended considerable space and time in Her Ladyship's judgment examining the status of TBY ie whether she was an agent of the appellant or the respondent, when she allegedly executed the trades utilising the account of the respondent. Her Ladyship first considered the relationship between the appellant and the respondent based on the share trading contract completed by the respondent and accepted by the appellant effective 3 March 2004. Her Ladyship concluded that TBY was acting as the agent of the appellant when conducting the unauthorised trades using the respondent's account for this reason:

> However, for the purposes of the instant case, the contracting parties are plaintiff and the defendant whereby the defendant contracts to purchase and sell shares upon the plaintiff's express request in return for a fixed fee. As the primary relationship for the purposes of share trading is between the plaintiff and the defendant, it follows that in so far as the plaintiff is concerned, the defendant and Ms Teh comprise one unified entity. In other words, Ms Teh is, in this context, inextricably connected to, or indivisible from the defendant. The dealer is indivisible from the dealer's representative in so far as the plaintiff's requirement for the execution of authorized trades is concerned. Put another way, the dealer and the dealer's representative are indivisible vis a vis the plaintiff. The plaintiff would be unable to execute trades on the Bursa without contracting with the defendant. Equally the plaintiff would not be able to give instructions to Ms Teh about his proposed transactions if she were not a licensed dealer's representative and agent of the defendant. In so far as the plaintiff who is a client is concerned, it is artificial to seek to draw a distinction between the functions and duties of Ms Teh and the defendant. Ms Teh is the defendant's agent.
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> (para 71 of the judgment)

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[11] Her Ladyship then appeared to express the view that her conclusion that TBY was the agent of the appellant when conducting the unathorised trades was reinforced on an examination of the terms and conditions of the SRC as evidenced by the following passage in the judgment of Her Ladyship:

> To that extent therefore, Ms Teh (as do all dealer's representatives) wore two 'hats' as it were: She was the plaintiff's agent for the limited purposes of taking orders and executing (authorised) trades at the behest of, and on the direction of the plaintiff; however she also at all times remained the agent of the defendant under the dealer's representative's contract, for the purposes of executing the Plaintiffs trades which pass through Bursa Malaysia Securities Bhd's trading engine. In other words the trades could not be conducted by Ms Teh without her being a dealer's representative with the defendant.
>
> (para 76 of the judgment)

[12] Following Her Ladyship's finding that TBY was the agent of the appellant when conducting the fraudulent trades using the respondent's account, Her Ladyship ruled the appellant responsible to account for the losses suffered by the respondent in his trading account.

JUDGMENT OF THE COURT

[13] With respect, we are unable to agree with the aforesaid reasoning of the learned trial judge. In our judgment, the learned trial judge was right to adopt the starting position that TBY was the agent of the appellant under the terms of the SRC. However, this is certainly not true of every incident in the relationship as evidenced by Her Ladyship's own observation in para 76 of the judgment that TBY wore two 'hats', as it were. In our opinion, with respect, the reasoning of Her Ladyship is inconsistent since in one breath, she acknowledged TBY to be wearing two hats, as it were, yet, in the next breath, Her Ladyship concluded that 'The dealer is indivisible from the dealer's representative in so far as the plaintiff's requirement for the execution of authorised trades is concerned'. In other words, Her Ladyship's finding in para 76 of her judgment, contrary to the opening words of that paragraph appears to be that TBY 'at all times remained the agent of the defendant under the dealer's representative contract'.

STATUS OF RELATIONSHIP TBY AND THE RESPONDENT

[14] Be that as it may, in our judgment, an equally important consideration in determining the status of TBY at the material time are the terms and conditions of the share trading contract which represented the contract between the respondent client and the appellant. This is because remisiers are a category of dealer's representatives who are peculiar to Singapore and Malaysia and persons who are allowed in the industry to have their own clients.

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Furthermore, the rules of Bursa Saham do not prohibit stock-broking firms from concluding separate contracts with individual clients incorporating such terms and conditions as it deems fit. Since such contracts with individual clients are not prohibited, it must follow that the terms and conditions of such contracts may alter the status of the relationship between the appellant and TBY in law. Accordingly, in our judgment, the learned trial judge ought to have considered the terms of the share trading contract and not just the SRC when considering the status of the appellant vis a vis the respondent.

[15] This court in the recent case of *Teh Seng Chay v Kuala Lumpur City Securities Sdn Bhd* [2012] 1 LNS 640 had occasion to consider whether the terms and conditions of the contract between the client and the stock-broking firm can serve to alter the agency relationship which otherwise prevailed between the stock-broking firm and the remisier. The facts in *Teh Seng Chay v Kuala Lumpur City Securities Sdn Bhd* were not materially dissimilar to the facts in this case in that the claim by the plaintiff was for losses arising from the wrongful transfer of shares from the client's share trading account. This court dismissed the claim of the client against the stock-broking firm based, inter alia, on the clause in the contract whereby the client agreed to not hold the stock-broking firm or any of its officers, employees or agent responsible or liable for whatever losses incurred as a result of the acts, representations and/or omission of the dealer's representative in carrying out his/her duties in connection with the client's trading account. It is significant that similar indemnity clauses appear in paras 16,19 and 20 of the share trading contract. In our judgment, these clauses should also be read against the background of the indemnity clauses in the SRC (see cll 6.1 and 6.2). In our opinion, these clauses read cumulatively render it illogical for this court to order judgment in favour of the respondent since, in that event, the appellant would be able to recover the judgment sum under cll 6.1 and 6.2 from TBY, only for the appellant to then be able to recover the same amount from the respondent under para 19 of the share trading contract by which the respondent:

> agreed unconditionally that in the event the dealer's representative is called upon to honour his obligation under an indemnity given by him to you, I shall pay all sums to which my dealer's representative has become liable to pay you in respect of my account and, which sums have been debited by you to my dealer's representative account, including the interest accrued.

[16] In our opinion, two other clauses in the two contracts which have a bearing on the status of the appellant and TBY vis a vis the respondent are cl 5.1.20 of the SRC and the declaration in the share trading contract. In our judgment, by cl 5.1.20 of the SRC, TBY agreed not to hold herself out as an agent of the appellant when effecting trades under the respondent's account. Similarly, by the following declaration 'I do hereby solemnly declare that the dealing in securities in respect of my trading account are/shall be carried out for

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me as principal' the respondent can be said to have agreed to treat TBY as his agent when TBY was undertaking trades in his account. Accordingly, in our judgment, these two clauses also altered the relationship between the appellant and the respondent which would otherwise be one of principal-agent.

Estoppel

[17] Even if we are wrong in our finding that the appellant is not liable for the losses suffered by the respondent in his account by reason of the terms and conditions of the two contracts, in our judgment, the doctrine of estoppel is applicable on the facts of this case. Her Ladyship, however, ruled estoppel do not extend to the particular facts of this case. With respect, we are unable to agree with the summary manner in which Her Ladyship dismissed the issue of estoppel. In our judgment, Her Ladyship notwithstanding quoting at length from the judgment of Chan Seng Onn JC in *RHB Cathay Securities Pte Ltd v Ibrahim Khan and other actions* [1999] 3 SLR 464 failed to appreciate the significance of His Lordship's pronouncements on the doctrine of estoppel in its applicability to fact situations involving remisiers and their client. In the context of remisiers and their clients, Her Ladyship quoted the following passages in the judgment of Justice Chan:

> 84 Before dealing with the issue of estoppels, it would in my view be appropriate to examine some of the implied obligations of the member companies in hiring their dealers, the nature of the stockbroking business where share trading transactions by clients are conducted normally through the telephone, and the corresponding need for a system of confirmation by contract notes and notification by clients of discrepancies and errors.
>
> 85 Member companies of the SES hiring persons whether as dealers or otherwise have a duty to screen all such persons to ensure that they are persons of integrity. By the very nature of the stockbroking business, large sums of money are involved in the daily share transactions executed through the member companies. The potential and opportunities for fraud are always present and must be guarded against.
>
> 86 If they hire rogues, then they must be held responsible for all their fraudulent activities and losses vis a vis their clients, who have opened accounts with them. This would of course be subject to any estoppels which might operate against the clients. If without the clients' knowledge the employees and dealers of the member company fraudulently use clients' accounts to trade and losses are incurred the member company is not entitled to recoup their losses from these unknowing clients. It is a risk that the member companies have to take and it is open to them to secure insurance against such risk. Between the principal who placed the rogues dealers and employees there and the innocent clients who have no voice in selecting these rogues, it is obvious that the liability for the fraud and the loss resulting therefrom must be borne by the principal.
>
> 87 So in the light of such risk, member companies of the SS have operated a notification system to minimise the risk to themselves of such fraudulent activities, including that of genuine errors in executing trades. This is the system of rendering

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contract notes and contra statements immediately after the respective trades and the issuing of regular quarterly statements of transactions to inform and confirm with their clients the transactions that were to have been authorised by them.

88 If their clients, as in this case, knowing that unauthorised transactions had been carried out in their accounts, failed to notify the company or turned a Nelsonian eye to what was happening in their accounts, they would do so at their own peril. For there would come a time when their failure would be sufficient to attract the application of the estoppels principle, and the transactions would then be deemed to have been authorised or adopted/ratified by them. The clients would be held liable to the member company for these transactions because their blameworthy conduct had allowed the fraudulent transactions to continue to the detriment of the member company. The actual or imputed knowledge of the fraudulent transactions would have tainted these clients and removed their cloak of innocence. Consequently the balance of liability as between the two 'innocent parties' (ie the member company versus them) would be tilted against them. Of course the clients would not be precluded from filing a claim against the fraudulent dealer or employee for the loss caused to them.

89...

90 It must be further recognised that instructions for share trading by clients to the dealers or remisiers of a broking house are normally given over the telephone. The transactions to buy or sell at a particular price are put into the SES electronic trading system by the dealer or remisier upon receipt of those oral instructions. Confirmation of trades done are usually over the phone to the client and thereafter followed by the contract notes. It is well-nigh impossible of the broking house to track the validity of each and every oral instruction over the phone by their clients to their dealers or remisiers.

91 For the purpose of executing such trades, the remisier or dealer's representative is acting as the agent of the client to input such trades for him into the electronic share trading system of the SES. Such trades punched into the system amount to representations made by the client to buy or sell shares as the case may be at a specific price. Vis a vis the member company, the remisier or the dealer's representative will be acting within his authority when he executes trades on behalf of his clients.

92 The member company provides the computers and the facilities for the remisier or dealer's representatives for linking with the SES electronic trading system and also manages the administration of such trades by the expeditious issuing and dispatch of the necessary contract notes confirming the trades, including the sending out of contra statements, quarterly statements and other necessary documentation to help the clients monitor their trades. As I stated earlier, the contract note sent directly to the clients are essentially to confirm that the transactions ordered by them have been properly and successfully executed.

93 I did not regard the reliance on a system of contract notes to surface any discrepancies, errors or unauthorised trades as being insufficient or unreliable as to amount to had business practice. There is a legal duty imposed on the clients, having opened a trading account in which trading instructions are accepted orally, to protest and to surface any discrepancies, errors or unauthorised trades reasonably

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promptly upon discovery. There is an associated duty to used reasonable diligence to check contract notes sent to them. These are implied duties arising out of the trading account being opened by the client, the close proximity of their contractual relationship and the foreseeability of damage were there to be no feedback to the member company of any unauthorised trades after discovery ... (at pp 54–57 of the appeal record *Jilid* 1 *Bahagian* A)

[18] With reference to the aforesaid quotes from the judgment of Justice Chan, Her Ladyship ruled the issue of estoppel to be not relevant to this case. Her Ladyship distinguished the facts in that case on the basis that unlike the facts in this case, the clients in *RHB Cathay Securities Pte Ltd v Ibrahim Khan and other actions* with knowledge of their remisier's fraudulent conduct failed to notify the stock broking firm of such fraudulent conduct. This is evident from the following passage in Her Ladyship's judgment:

The court then went on to consider the doctrine of estoppel as applicable in instances where, despite the receipt of voluminous contract notes amounting to evidence of unauthorised transactions, a client chooses to remain silent and not to take issue. In such instances, having full knowledge of the existence of such unauthorized transactions, an estoppel will work as against the client to preclude him from denying liability for any losses arising from such unauthorised transactions, which losses are borne by the member company or stock broking firm or dealer. (at p 40, para 87 of the judgment)

[19] The learned trial judge then ruled that there was no basis for estoppel to operate against the respondent on the facts of this case for the following reasons:

The issue of estoppel or ratification or waiver cannot arise in the instant case as there is no evidence that the plaintiff was aware at any time of the abuse or misuse of his share trading account. The plaintiff cannot be faulted for Ms Teh's act of inducing the Plaintiff, who is not conversant with the English language and who cannot read, to have his voluminous documentation comprehensively stored and kept for him while she personally updated him on a daily basis with fictitious documentation. While he was naive, he cannot be said to have willfully turned a blind eye to any wrongdoing. This is because he was entirely unaware of any wrongdoing on Ms Teh's part. In these circumstances it appears to be clear to this court that the defendant as principal is liable for the fraudulent or dishonest or unauthorised acts of its agent, Ms Teh. (at p 43, para 90 of the judgment)

[20] Our understanding of Her Ladyship' ruling is that so long as the respondent did not understand or avail himself of the contract notes etc, then, he is not estopped from asserting his contractual rights against the appellant, by remaining silent. The learned trial judge also interpreted the ruling of Justice Chan in *RHB Cathay Securities Pte Ltd v Ibrahim Khan and other actions* on the issue of estoppel to be solely premised on the fact that the clients in that case failed to notify the stock broking firm notwithstanding having knowledge

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of the fraudulent conduct of their remisier. With respect, in our judgment, Her Ladyship is wrong on both counts. In our judgment, Justice Chan in *RHB Cathay Securities Pte Ltd v Ibrahim Khan and other actions* recognised estoppel as capable of operating against a party to a contract in cases where the circumstances justified imputing knowledge of the fraud of the remisier upon the client. These circumstances were highlighted by His Lordship, first, in para 88 of the judgment when His Lordship explained the purpose behind the stock broking firm furnishing contract notes etc. to be:

> This is the system of rendering contract notes and contra statements immediately after the respective trades and the issuing of regular quarterly statements of transactions to inform and confirm with their clients the transactions that were to have been authorised by them. (para 87)

[21] According to His Lordship, a client of a stock broking firm who failed to object timeously, cannot rely on ignorance to assert his contractual rights after having received the contract notes etc because:

> The actual or imputed knowledge of the fraudulent transactions would have tainted these clients and removed their cloak of innocence. Consequently the balance of liability as between the two 'innocent parties' (ie the member company versus them) would be tilted against them. Of course the clients would not be precluded from filing a claim against the fraudulent dealer or employee for the loss caused to them. (para 88)

[22] With respect, Her Ladyship failed to appreciate that the premise for Justice Chan ruling that ignorance was no excuse for the client not reporting the fraudulent conduct of the remisier was because:

> There is a legal duty imposed on the clients, having opened a trading account in which trading instructions are accepted orally, to protest and to surface any discrepancies, errors or unauthorised trades reasonably promptly upon discovery. There is an associated duty to used reasonable diligence to check contract notes sent to them. These are implied duties arising out of the trading account being opened by the client, the close proximity of their contractual relationship and the foreseeability of damage were there to be no feedback to the member company of any unauthorised trades after discovery ...

[23] Our Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 has similarly accepted that whilst mere silence or inaction cannot amount to a representation so as to give rise to the operation of the doctrine of estoppel, the position would be otherwise if there was a duty to inform the other party to the contract. The Federal Court's pronouncements on this subject arose in this manner. Lord Scarman delivering the advice of the board in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors* [1986] AC 80 on the question of estoppel said:

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> Their Lordships having held that the company was not in breach of any duty owed by it to the banks, it is not possible to establish in this case an estoppel arising from mere silence, omission, or failure to act.
>
> Mere silence or inaction cannot amount to a representation unless there be a duty to disclose or act: *Greenwood*'s case [1933] AC 51 at p 57. And their Lordships would reiterate that unless conduct can be interpreted as amounting to an implied representation, it cannot constitute an estoppel: for the essence of estoppel is a representation (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss: *Greenwood*'s case per Lord Tomlin, at p 57. (at p 344)

Justice Sri Ram (as he then was) writing the judgment of the Federal Court, had this to say on the pronouncements of Lord Scarman:

> It is quite clear that the Privy Council in Tai Hing was considering a case of estoppel by representation in circumstances in which there was no duty to speak and the plaintiff had merely remained silent. It was not a case where the customer had encouraged the bank to believe that the cheques were not forged. Had the evidence pointed in that direction, we have no doubt that the Privy Council would have arrived at the opposite conclusion upon the question of estoppel. (at p 344)

[24] In our judgment, the respondent was clearly under a duty in this case to notify the appellant of any discrepancies in his trading account. This duty was imposed by para 11 of the share trading contract whereby the respondent:

> Agree that all contract notes, contra statements and monthly statements or other documents of like nature generated and/or issued by you shall be deemed to be final, conclusive and binding on me if you do not receive any objection in writing from me within five (5) trading days from the date of the aforesaid documents at any time.

[25] The justification for a clause of this nature being treated as imposing a duty on the client of the stock broking firm is to be found in the observations of Justice Chan that:

> It is well-nigh impossible for the broking house to track the validity of each and every oral instruction over the phone by their clients to their dealers or remisiers.

[26] We are conscious that on the facts of this case, the fraud perpetrated by the remisier included having the respondent transfer the address for service of the contract notes etc to the address of the remisier. With respect, this can hardly afford a justification for the learned trial judge to transfer liability for the loss in the respondent's account to the appellant since it is the foolhardiness of the respondent himself which resulted in the respondent being ignorant of the manipulation of his trading account by the remisier. In our judgment, applying the pronouncements of Justice Sri Ram in *Boustead Trading (1985) Sdn Bhd v*

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Arab-Malaysian Merchant Bank Bhd to the facts of this case, the applicability of estoppel would depend on the answer to this question; did the failure of the respondent to notify the appellant of the abuse of his trading account pursuant to para 11 of the standard trading contract, amount to a representation (by conduct) to the appellant that there were no discrepancies in this trading account? In our judgment, the answer to this question must be in the affirmative since the respondent not only did not revert after five days, but took several years to discover the losses of his account. As with the trial judge, our sympathies are with the respondent, however, dealing in stocks and shares is not meant for the faint-hearted less still for the poorly educated. The fact of the matter is that respondent executed the share trading contract and by the terms of this contract, he assumed a duty to monitor his trading account closely, this he failed to do. His failure, in our judgment, amounted in law to a representation by conduct to the appellant that there were no discrepancies in his trading account thereby causing the appellant to retain the services of TBY as its remisier. In these circumstances, in our judgment, the respondent is estopped in law from seeking to recover his losses in his trading account.

[27] With respect, we consider the learned trial judge's failure to have due regard to the terms of the standard trading contract when determining the nature of the relationship between the appellant and the respondent and Her Ladyship's erroneous application of the doctrine of estoppel to the facts of this case to be sufficiently material to warrant appellate interference. Accordingly, we allowed this appeal and set aside the orders of the High Court including that for costs. We make no order as to the costs of this appeal. We order the deposit to be refunded to the appellant.

Appeal allowed with no order as to costs.

Reported by Kanesh Sundrum